FILE COPY

In the Supreme Court

OF THE

United States

NOV 29 1946

OCTOBER TERM, 1946

No. 626

JAMES E. MARKHAM, Alien Property Custodian,

Petitioner,

vs.

ALVINA ALLEN, GERTRUDE DINWIDDIE, HILDA PIGOZZI, FRED WAGNER, PAUL WAGNER, and RUDOLPH WAGNER,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Ninth Circuit.

JOSEPH WAHRHAFTIG,
Russ Building, San Francisco, California,
Attorney for Respondents.

ROBERT W. KENNY,
Attorney General of the State of California,
EVERETT W. MATTOON,
Deputy Attorney General of the State of California,
600 State Building, Los Angeles, California,
Amici Curiae.

S. C. MASTERSON,
413 Tenth Street, Richmond, California,
MATT WAHRHAFTIG,
Bank of America Building, Oakland, California,
JOSEPH GENSER,
413 Tenth Street, Richmond, California,
Of Counsel.

PARNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

Table of Contents

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Treaty and statutes involved	2
Statement	3
Reasons for denying the writ	3
Conclusion	12
Appendix	i-iv

Table of Authorities Cited

Cases	Pages
Allen v. Markham, 156 F 2d 653, 663	3
Bevilacqua, Estate of, 70 ACA 679, 161 P 2d 589	7
Brenham v. Story, 39 Cal. 179	11
Chinese Exclusion Case, 130 V. J. 581	9
Irving Trust Co. v. Day, 314 V. J. 556, 562	4
Knutzen's Estate, In re, 70 ACA 856, 161 P 2d 598	6
Techt v. Hughes, 229 N. Y. 222	8
Terrace v. Thompson, 263 V. J. 197	4
United States v. White Dental Co., 274 V. J. 398, 402, 403	10
Western Pacific Railroad Co. v. Godfrey, 166 Cal. 346, 349	11
Whitney v. Robertson, 124 V. J. 190	9

Treaties	
Germany, December 8, 1923, Art. IV, 44 Stat. 2132, 2135	2, 5, 6, 8, 9, 10
Germany, December 8, 1923, Arts. I, XII, XIII, and XXIV, 44 Stats. 2132	6

Federal Statutes	
Estate Tax Law, 26 U.S.C.A. Section 813(b)	7
Judicial Code, Section 240(a)	2
Trading with the Enemy Act, 40 Stat. 411, 50 U.S.C. App.:	
Section 3	10
Section 5	9, 10
Section 7 (c, d)	10

State Statutes	
California Statutes:	
Section 259 California Probate Code (Stats. 1941, c. 895)	2, 3, 6, 7, 11

Pages

Section 259.1, California Probate Code (Stats. 1941, c. 895) 2, 3, 11

Section 259.2, California Probate Code (Stats. 1941, c. 895) 2, 3, 11

Section 259, California Probate Code (Stats. 1945, c. 1160) 2, 11

Miscellaneous

Harvard Law Review, Note, 57: 730, 731 10

Letter from Acting Secretary of State Grew to the Attorney-General, May 31, 1945 10

Meares, Trading With the Enemy Act (Annotated) 1924, p. 34 8

The Axis in Defeat, Department of State Publication 2423, pp. 62, 72 8

In the Supreme Court,

OF THE

United States

OCTOBER TERM, 1946

No. 626

JAMES E. MARKHAM, Alien Property Custodian,

Petitioner,

vs.

ALVINA ALLEN, GERTRUDE DINWIDDIE, HILDA PIGOZZI, FRED WAGNER, PAUL WAGNER, and RUDOLPH WAGNER,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Ninth Circuit.

OPINIONS BELOW.

The opinion of the District Court (R. 29-40) is reported at 52 F. Supp. 850. The opinion of the Circuit Court of Appeals (R. 52-63) is reported at 156 F. 2d 653.

JURISDICTION.

The judgment of the Circuit Court of Appeals sought to be reviewed was entered on May 22, 1945. (R. 63-64.) A petition for amendment of the opinion was denied by an order entered on July 17, 1946. (R. 64.) On August 1, 1946, Mr. Chief Justice Vinson extended the time for filing a petition for certiorari until October 21, 1946. The jurisdiction of this Court is invoked by the petitioner under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED.

1. Whether Sections 259, 259.1 and 259.2, California Probate Code (Stats. 1941, ch. 895) are invalid as an invasion of the federal province of control over foreign affairs.

2. Whether Article IV of the Treaty of 1923 with Germany was abrogated by the war between the United States and Germany, and by the Trading With the Enemy Act.

3. Whether Section 259, California Probate Code, as amended (Stats. 1945, ch. 1160) is such a change of law as governs upon appeal.

TREATY AND STATUTES INVOLVED.

The pertinent portions of the treaty and statutes involved are set out in the Appendix, pp. i-iv.

STATEMENT.

Pursuant to paragraph 4 of Rule 27, Revised Rules of the Supreme Court of the United States, respondents adopt the Statement contained in petitioner's Petition for Writ of Certiorari (Petition pp. 3-6), with the exception of the closing sentence thereof (Petition p. 6). This last sentence of the Statement refers to the opinion of the Circuit Court of Appeals for the Ninth Circuit (*Allen v. Markham,* 156 F 2d 653, 663; R. 62-63) and characterizes the opinion as holding "that the amended statute imposes the burden of proof of the existence of reciprocal inheritance rights upon the Custodian (R. 62-63)." (Petition p. 6.)

Respondents' statement characterizes this opinion as holding that the amended statute does not apply upon appeal, that this case must be governed by the law as of the date of the decedent's death, e.g. Sections 259, 259.1 and 259.2, California Probate Code (Stats. 1941, ch. 895), that the rights and interests of all parties are determined by the law as of that date, and that, therefore, the burden of proof of the existence of reciprocal inheritance rights remains upon the Custodian. (R. 62-63.)

REASONS FOR DENYING THE WRIT.

The national importance of the issues involved in this case is not determinative of the question as to whether the writ should issue, if the decision below

is considered correct. Petitioner states that five other states, besides California, have similar reciprocal inheritance statutes (Petition p. 7, n. 2) and it is to be noted that these are largely within the same judicial circuit governed by the court which rendered the decision in issue. The decision of the Circuit Court of Appeals for the Ninth Circuit is binding upon all of those states which have invoked such statutes to defeat vesting orders. (Petition p. 7.) There is, then, no conflict of decision on the issues involved. The entire weight of petitioner's argument for the issuance of the writ must depend on the intrinsic worth of the decision of the lower court. This decision is correct.

---

1. **THE CALIFORNIA STATUTE IS NOT INVALID AS AN INVASION OF THE FEDERAL PROVINCE OF CONTROL OVER FOREIGN AFFAIRS.**

The state has power to regulate the right of inheritance and succession and testamentary disposition of property within the state.

Irving Trust Co. v. Day, 314 U.S. 556, 562.

The power of the state government to regulate rights of inheritance includes the power to deny all aliens any right to inherit. *Terrace v. Thompson*, 263 U.S. 197. This is conceded by petitioner. (Petition p. 9.)

If the state has the power to deny absolutely, it must, then, have the power to grant or deny conditionally. The only questions raised by petitioner are

whether the condition of reciprocity exacted by the California legislature (1) invades the treaty-making power of the federal government (Petition p. 8) and (2) is related to any legitimate benefit to California connected with the exercise of power over succession to property. (Petition p. 9.)

The latter question is simply answered: the requirement of reciprocity is but an application of the principles of comity, a doctrine familiar in conflicts of laws, to legislative control of rights of inheritance. The condition exacted, that of reciprocity of rights of inheritance, is directly and obviously related to a legitimate field of concern to the California legislature —namely, the rights of its citizens to receive their inheritance from foreign countries.

Petitioner contends, in respect to the first question, that the California statute is invalid as an indirect attempt to negotiate with foreign states for reciprocal inheritance rights, and is, therefore, an unconstitutional invasion of the federal treaty-making power. (Petition p. 8.) The argument, in effect, is that a state statute not in conflict with the terms of a federal treaty, but which in fact depends for its effect and operation upon federal treaties, and merely seeks to implement and supplement such treaties, is nevertheless void. The California statute merely executes the provisions of such treaties as remain in force and contain provisions similar to Article IV of the Treaty of 1923 with Germany. (Appendix p. i.)

The California statute by its reciprocal provisions recognizes the treaty making power of the Federal Government. By its very terms this statute recognizes the supremacy of the treaty making power and the statute depends for its very operation upon the exercise of that power by the Federal Government. The statute is designed solely to execute within a field of state power the purposes of treaties executed by the Federal Government. Where no treaty is in effect the states have power over rights of succession, whether by will or intestacy, by aliens.

Particularly in point on this issue is the recent California case of *In re Knutzen's Estate,* 70 ACA 856, 161 P 2d 598 (1945). In this case, also involving the Treaty of 1923, the California Probate Court ordered distribution of the entire estate to the local heir, under Section 259, Probate Code, cutting off three German heirs-at-law. The Custodian contended that the statute was unconstitutional as an invasion of the treaty-making power. The Appellate Court, proceeding under the assumption that the Treaty was still in effect and not abrogated, held that the first paragraph of Article IV of the Treaty (Appendix p. i) does not purport, in terms, to supplant states laws governing the laws of succession, but that the language of the paragraph recognizes that local law can disqualify aliens from *taking* or *holding* realty. It was further noted that Articles I, XII, XIII and XXIV of this Treaty, governing the rights of consuls to administer estates of aliens, contained such qualifying phrases as "so far as the laws of the country per-

mit", and "provided the laws of the place where the estate is administered so permit". The court considered that the presence of such qualifying phrases throughout the Treaty clearly demonstrated that local state laws must be given effect. Accord: *Estate of Bevilacqua,* 70 ACA 679, 161 P 2d 589 (1945).

The California statute does not in any sense purport to negotiate with foreign states, nor does it tend to induce any foreign state to enter into any binding pact. Section 259, California Probate Code (Stats. 1941, ch. 895) gives equal effect to treaties and foreign law which existed prior to its enactment as it does to treaties and foreign law concluded and enacted since, whether the latter were intended and designed to comply with the statute or not. The effect of the California statute bears no more resemblance to treaty-making than does the Federal Estate Tax Law in giving credit for state inheritance taxes paid. (26 U.S. C.A. Sec. 813 (b).) If the latter Federal statute induces the several states to enact similar laws, it is only the exercise of a rightful, inherent power, and certainly cannot be characterized as the creation of treaties between the Federal and State Governments where none is authorized.

Clearly, then, the State of California has the power to legislate on the subject of rights of inheritance, and it may so condition this right as provided in this statute.

2. ARTICLE IV OF THE TREATY OF 1923 WITH GERMANY WAS ABROGATED BY THE WAR BETWEEN THE UNITED STATES AND GERMANY, AND BY THE PROVISIONS OF THE TRADING WITH THE ENEMY ACT.

There is an inconsistency between a state of war, especially war as it is waged in our times, and the continued guarantee of rights of inheritance to the citizens and nationals of an enemy country. This is particularly true of the recent conflict between this country and Germany, a conflict in which the avowed purpose of both the belligerents was the complete destruction of the other; and which conflict did result in the obliteration of any central government in Germany, so that one of the parties to the Treaty in issue has entirely ceased to exist and no longer remains capable of performing its terms.

See:

Declaration Regarding Defeat of Germany and Assumption of Supreme Authority by Allied Powers, June 5, 1945. *The Axis in Defeat*, Dept. of State Publication 2423, pp. 62, 72 (Appendix p. iv).

The opinion of Judge Cardozo in *Techt v. Hughes*, 229 N.Y. 222, cert. den. 254 U.S. 643, upon which petitioner places great reliance (Petition p. 10) is readily distinguishable from the instant case in that the decision involved the rights of an enemy alien *resident* in this country. See: Meares, Trading With the Enemy Act, Annotated (1924) at p. 34. Further, there had been no hiatus in the existence of a central government in Austria following the war's end.

In addition to the nature of the conflict, and the resultant collapse of the German State, the terms and spirit of the Trading With the Enemy Act (50 U.S. C.A. Appendix) are entirely irreconcilable with Article IV of the Treaty of 1923. The court below (R. 62) adverted to this conflict and concluded, correctly, that "To award the decedent's property to the Alien Property Custodian would be to give him a right in direct contradiction to the right of aliens under the Treaty which he contends is in full effect."

The Treaty purports to provide that Germans shall be able to take real and personal property from the United States, if certain local conditions are met; while the Trading With the Enemy Act is a flat inhibition upon such rights. In such cases where a later, Federal statute conflicts with a treaty provision, the latter has been held to fail.

Chinese Exclusion Case, 130 U.S. 581 (1888);
Whitney v. Robertson, 124 U.S. 190 (1888).

Petitioner states (Petition p. 14) that Section 5(b) of the Trading With the Enemy Act merely confers authority to vest property, and, further, that not until this authority is actually exercised does the statute conflict with the Treaty. It is, however, from the *promulgation* of a power contradictory to the Treaty, rather than the actual *exercise* of such power, that the governing principle must be derived. The Statute, besides permitting the vesting of such property, forbade German nationals from removing property or money from the United States, to have any communi-

cation of a business nature with persons in this country, and prohibiting the bringing of German nationals into the United States or to transmit communications to them. (Trading With the Enemy Act, Sec. 7 (c, d) 5 and 3.) The very spirit of the statute is contrary to the Treaty.

Note, 57 *Harvard Law Review,* 730 at 731 (1944).

The basic principle to govern this case is unaffected by the possibility that Congress *may,* in the future, forward some, or even most of the property to the foreign claimants. Should this occur, it would not be any confirmation of a right, but as a matter of grace to the vanquished.

See:

United States v. White Dental Co., 274 U.S. 398 at pp. 402, 403.

The Letter from Acting Secretary of State Grew to the Attorney-General (Petition, Appendix, pp. 24-31) cannot be accorded a great deal of weight. It is, at most, a review of judicial opinions by a layman, and fails to advert to the inconsistency between the Trading With the Enemy Act and the continued existence of Article IV of the Treaty, nor does it mention the important political problem raised by the collapse of the German State.

3. SECTION 259, CALIFORNIA PROBATE CODE, AS AMENDED (STATS. 1945, c. 1160) WAS NOT GOVERNING UPON THIS APPEAL.

Petitioner states (Petition p. 19) that the court below applied the amended California statute to the case, but still held that the burden of proof on the issue of reciprocity was on the Custodian. (Petition p. 20.) Petitioner is laboring under a misconception of the opinion below. The court below, first, discusses the constitutionality of Sections 259, 259.1 and 259.2, California Probate Code (R. 57-58), not the constitutionality of Section 259 alone, which would have been the case if the amended statute had been considered applicable, since the 1945 amended statute had been considered applicable, since the 1945 amendment repealed Sections 259.1 and 259.2. Further, it is quite clear that the court below considered the amended statute inapplicable to the appeal. The court states that the law as of the date of decedent's death must govern. (R. 63.)

Under the established law of California, inheritance rights are determined by the law in effect at the date of the decedent's death. Subsequent laws or conditions are immaterial.

Brenham v. Story, 39 Cal. 179;
Western Pacific Railroad Co. v. Godfrey, 166 Cal. 346, 349.

In any event, the case below was submitted upon an agreed statement of facts by which, as a matter of pleading, the Alien Property Custodian is now bound. (R. 30.)

CONCLUSION.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Dated, Richmond, California,
November 15, 1946.

JOSEPH WAHRHAFTIG,
Attorney for Respondents.
ROBERT W. KENNY,
Attorney General of the State of California,
EVERETT W. MATTOON,
Deputy Attorney General of the State of California,
Amici Curiae.

S. C. MASTERSON,
MATT WAHRHAFTIG,
JOSEPH GENSER,
Of Counsel.

(Appendix Follows.)

Appendix

Article IV of the Treaty of Friendship, Commerce and Consular Rights, signed December 8, 1923, proclaimed October 14, 1925, provides as follows, 44 Stat. 2132, 2135:

> Where, on the death of any person holding real or other immovable property or interests therein within the territories of one High Contracting Party, such property or interests therein would, by the laws of the country or by a testamentary disposition, descend or pass to a national of the other High Contracting Party, whether resident or non-resident, were he not disqualified by the laws of the country where such property or interests therein is or are situated, such national shall be allowed a term of three years in which to sell the same, this term to be reasonably prolonged if circumstances render it necessary, and withdraw the proceeds thereof, without restraint or interference, and exempt from any succession, probate or administrative duties or charges other than those which may be imposed in like cases upon the nationals of the country from which such proceeds may be drawn.
>
> Nationals of either High Contracting Party may have full power to dispose of their personal property of every kind within the territories of the other, by testament, donation, or otherwise, and their heirs, legatees and donees, of whatsoever nationality, whether resident or non-resident, shall succeed to such personal property, and may take possession thereof, either by themselves or by others acting for them, and retain or dispose

of the same at their pleasure subject to the payment of such duties or charges only as the nationals of the High Contracting Party within whose territories such property may be or belong shall be liable to pay in like cases.

California Probate Code, Sections 259, 259.1, 259.2, Stats. 1941, c. 895.

259. *Right of aliens to inherit: (Dependence on reciprocal rights).* The rights of aliens not residing within the United States or its territories to take either real or personal property or the proceeds thereof in this State by succession or testamentary disposition, upon the same terms and conditions as residents and citizens of the United States is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take real and personal property and the proceeds thereof upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are inhabitants and citizens and upon the rights of citizens of the United States to receive by payment to them within the United States or is territories money originating from the estate of persons dying within such foreign countries.

259.1. *Burden of proof (as to reciprocal rights).* The burden shall be upon such nonresident aliens to establish the fact of existence of the reciprocal rights set forth in Section 259.

259.2. *When property escheats.* If such reciprocal rights are not found to exist and if no heirs other than such aliens are found eligible to take such property, the property shall be disposed of as escheated property.

Section 259 of the California Probate Code, as amended by Chapter 1160, California Statutes, 1945, effective September 15, 1945, provides as follows:

> The right of aliens not residing within the United States or its territories to take real property in this State by succession or testamentary disposition, upon the same terms and conditions as residents and citizens of the United States is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take real property upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are residents and the rights of aliens not residing in the United States or its territorites to take personal property in this State by succession or testamentary disposition, upon the same terms and conditions as residents and citizens of the United States is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take personal property upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are residents. It shall be presumed that such reciprocal rights exist and this presumption shall be conclusive unless prior to the hearing on any petition for distribution of all or a portion of such property to an alien heir, devisee, or legatee not residing within the United States or its territories a petition is filed by any person interested in the estate requesting the court to find that either one or both of such reciprocal rights does not or do not exist as to the country of which such alien heir, devisee or legatee is resident. Upon the hearing of such

petition the burden of establishing the nonexistence of such reciprocal right or rights shall be upon the petitioner. Notice of such hearing shall be given in the manner provided by Section 1200 of this code.

Section 5 (b) of the Trading With the Enemy Act, as amended by Section 301, Title III, First War Powers Act, 1941, 55 Stat. 839, 50 U.S.C. App., Supp. V, 5 (b), provides in pertinent part as follows:

(1) During the time of war or during any other period of national emergency declared by the President * * * any property or interest of any foreign country or national thereof shall vest, when, as, and upon the terms, directed by the President, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; * * *

"There is no central government or authority in Germany capable of accepting responsibility for the maintenance of order, the administration of the country, and compliance with the requirements of the victorious powers."

Declaration Regarding Defeat of Germany and Assumption of Supreme Authority by Allied Powers, June 5, 1945. *The Axis in Defeat*, Department of State Publication 2423, p. 62.

"5. The Allied Representatives will regulate all matters affecting Germany's relations with other countries. No foreign obligations, undertakings, or commitments of any kind will be assumed or entered into by or on behalf of German authorities or nation without the sanction of the Allied Representatives.

"6. The Allied Representatives will give directions concerning the abrogation, bringing into force, revival or application of any treaty, convention or other international agreement, or any part or provision thereof, to which Germany is or has been a party."

Agreement between Governments of the United Kingdom, United States of America, and USSR, and the Provisional Government of the French Republic, made in Berlin, Sept. 20, 1945. *The Axis in Defeat,* State Department Publication 2423, p. 72.